IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.346 of 1998

The Intelligence officer,
Narcotic Control Bureau,
South Zone Unit,
Chennai. .. Appellant/Complainant

vs.

1.M.Shaik Mohammad
2.NMurugan
3.Kattin Durai
4.Rajeshyam Sharma @ More Sharma
5.Satish Ramlal @ Srikant Vajpayee @ Babloo
6.Mohanlal Ramlal @
Gopal Godavat .. Respondents/Accused

Prayer: This criminal appeal has been filed under Section 378 of Cr.P.C against judgment dated 03.02.1998, in C.C.No.631 of 1995 on the file of the Special Court for the NDPS Act, Chennai.

For Appellant : Mr.N.P.Kumar, Spl.Public Prosecutor for NDPS Cases, Chennai.

For Respondents 4 to 6 : Mr.Rajarathinam, Advocate, as Amicus Curiae for R1 & 3

For Respondent No.2: Mrs. S. Jothivani

JUDGMENT

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This appeal has been preferred by the State against the judgment of acquittal in C.C.No.631/1995 on the file of the Court of Special Judge for NDPS Cases, Chennai. The appellants/A1 to A6 charged under Section 8(c) r/w 21 and 29 of Narcotic Drugs Pshycotrapic Substance Act (hereinafter it will be referred as 'Act' for the sake of convenience).

2. The short facts relevant for the purpose of deciding this appeal are as follows:-

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2(a) The Intelligence Officer, Narcotic Control Bureau, South Zone Chennai, has filed a complaint after completing the investigation against the accused in F.No.48/1/5/95/NCB/MDS. After taking cognizance of the case, the trial Court has assigned C.C.No.631/1995. On specific intelligence, the Officer of Narcotic Control Bureau on 01.10.1995 searched the premises of one Shaik Mohammed (A1), at Door No.75, Lebbai Street, Pudupet, Madras in the presence of two independent witnesses and in the presence of Sheik Mohameed, which result in the recovery of about 1.500 Kgs of brown coloured powder believed to the heroin kept in two packets which were kept inside a cloth bag in an un-used kitchen of the second floor of the said premises. A mahazar containing the details regarding the search, seizure and drawal of samples from the seized contraband for the purpose of chemical analysis. The NCB Officer also searched STD Booth by name 'Kavita Telecom' at Door No.4, Langs Garden Road, Pudupet, Chennai, in the presence of one Kattin Durai(A2), the person incharge of the Booth , on 01.10.1995, at that time one Murugan (A3) was also available in the said STD Booth. As a result of the search conducted in the presence of witnesses, the Officers could recover about 2 kgs of heroin kept in second drawer of the table kept in the Booth. Another mahazar was drawn on the spot detailing search and seizure of drawal of sample contraband seized for the purpose of chemical analysis. On 01.10.1995, the Officers also searched Door No.206 & 207 of Hotel Rolex, Chennai-1, under occupation of one Rajeshyam Sharma of Mandsaur, based on some intelligence and recovered about 4.5 grams of brown colour powder, the heroin, from his pant packet.

2(b) After the search, Sheik Mohammed(A1) was interrogated and his voluntary confession statement was recorded under section 67 of the Act. A2-Murugan was interrogated and his voluntary confession statement was recorded under Section 67 of the Act. A3-Kattin Durai was interrogated and his voluntary confession statement was recorded under Section 67 of the Act. A4-Raheshyam Sharma was interrogated and his voluntary confession statement was recorded under Section 67 of the Act. Mohanlal(A5) and Satish(A6), alleged carriers of the contraband were also interrogated and they gave voluntary confession statement and the same were recorded under Section 67 of the Act. On the basis of the voluntary confession statements and on the basis of the material objects seized, the accused were arrested on 01.10.1995 and were produced before the additional Chief Metropolitan Magistrate, (EO), Egmore, Chennai, who remanded them to judicial custody. The samples drawn from the seized properties were sent to Chemical Examiner, Customs House, Madras-1, for chemical examination on 06.10.1995, through Special Court for NDPS cases, Chennai, and the expert's report revealed that the samples tested are Diacetyle Morphine, a narcotic drug prohibited under NDPS Act.

2(C) A1 to A6 with other known and unknown persons at Chennai, Mandsaur and other places entered into a criminal

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conspiracy to do or cause to be done illegal acts viz., purchase, possess, conceal, import and export inter-state for the purpose of selling in India and for exporting out of India narcotic drug viz., heroin weighing totally 3.500 kgs. A1 to A6 have committed an offence punishable under Section 29 r/w 21 of the Act. In pursuance of the said conspiracy and in the course of the said transaction A4 procured the said 3.5 kgs of heroin and transported the same to Madras from Mandsaur during the last week of September 1995 along with A5 and A6 and therey A4, A5 & A6 have committed an offence punishable under Section 21 of the Act. In pursuance of the said conspiracy and in the course of the same transaction A2 received the said 3.5 kgs of heroin from A4 and handed it over to A1 during the last week of September, 1995 at Madras who in turn handed over 2 kgs of heroin to A3 to be kept in safe custody. In pursuance of the said conspiracry and in the course of the same transaction A1 was found in possession of 1.500 kgs of heroin on 01.10.1995 and thereby committed an offence punishable under Section 21 of the Act. In pursuance of the said conspiracy and in the course of the same transaction A2 and A3 were found in possession of 2 kgs of heroin on 01.10.1995 and thereby committed an offence punishable under Section Section 21 of the Act. Hence, the complaint.

2(d) On appearance and production of the accused, copies were furnished to the accused by the trial Court under Section 207 of Cr.P.C. When charges under Section 8(c) r/w 21 and 29 of the Act were framed against A1 to A6 and readover to A1 to A3 in vernacular language and A4 to A6 in Hindi through a translator, all these accused denied their complicity with the crime.

3. On the side of the prosecution P.W.1 to 9 were examined, Ex.P.1 to Ex.P.17 and M.O.1 to M.O.18 were marked. On the side of the accused D.W.1 was examined and Ex.D.1-Nominal Register of the Central Prison Hospital, was marked. Summons to D.W.1 issued by Court was marked as Ex.C.1.

4. 4(i) P.W.1-Vijayalakshmi, who is working as an Intelligence Officer in NCB, South Zone Region, in her evidence has stated that she is one of the Officers who gathered intelligence about the trafficking of narcotic drugs. On 30.09.1995 she along with two more officers filed an intelligence report at 9.00 pm to the Assistant Director who gave Direction. On 01.10.1995 herself (P.W.1) and the Assistant Director went to Door No.57, Lebbi Street, Chennai, along with two independent witnesses. Ex.P.1 is the intelligence report. On the basis of the intelligence report-Ex.P.1 they went to the above said house with two independent witnesses viz. Gurusamy and K.Sunilkumar, and found in the house one Sheik Mohamed(A1) along with his wife Sulthan Beebee, and two children and some other persons residing their. After showing the

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identity card to them the above said officers informed them that they are going to conduct a search in the said house as per the provisions contemplated under the NDPS Act.

4(ii) When questioned as per the right conferred to them under the Act, as to whether they prefer to be searched before the Judicial Magistrate or before a Gazetted Officer, A1 replied that it is not necessary to take him before the Judicial Magistrate. At that time Mr.Krishnamurthy (P.W.9), a Gazetted Officer, who is above the rank of Assistant Director of NCB, was present and A1 said that the search can be conducted in P.W.9's presence itself. As a result of search, from an unused kitchen in the second floor a cloth bag was found. Inside the cloth bag two packets one small and one big were found. The packets were pasted with adhesive tapes. When the tapes were removed, there were two polythene covers placed one inside the other, were found. Two more polythene covers were found kept inside. They found inside the presence of brown powder. On enquiry A1 said that it was heroin, a narcotic drug. From both the bags small portion of brown powder were separately taken and tested with the help of test kit. The test answered for the presence of heroin. Bulk packet weighed approximately 1 kg and small bag weighed 500 grams. Inside the outer cloth the name 'Rolex Hotel' was found inscribed. The card marked as Ex.P.2 was also found there. On the backside of Ex.P.2, the name Rajesh Shyam Sharma was written both in English and Hindi and also Room No.206 & 207 were found written therein. Rajesh Shyam Sharma is the fourth accused in this case. When the contrabands were seized P.W.1 got the signature of A1 and two independent witnesses, besides she herself being signed therein with date. The samples are each weighing approximately 5 grams were taken from the packets and all the four samples were put in four small polythene covers and again they were put in four paper covers, pasted, sealed with NCB seal marked as S1 to S4, they are M.O.1 to M.O.4. P.W.1 has also taken signature of A1 and two more witnesses besides she also being signed on the same.

4(iii) After taking samples, balance of quantity of brown powder along with polythene cover were put in two big paper covers pasted sealed and marked as P1 and P2 respectively, they are M.O.5 & 6, wherein also P.W.1, two independent witnesses besides A1 signed. The brown powder found in M.O.1 is M.O.7. M.O.8 is the brown powder found in Ex.B.2. All the other packing materials were put in a paper cover and pasted, sealed and marked as M.O.9. All these thing were found in a cloth bag written in tamil as "Ayutha Pooja Vizha". These are all placed inside in P.3 by P.W.1, which is marked as M.O.9. The mahazar was prepared for the seizure of the contrabands in the presence of witnesses and the formalities were completed on 8.30 am. In mahazar also A1 and two independent witnesses have signed with date. P.W.1 has also signed in it. The Assistant Director of NCB also signed in it. The seal which was affixed in all the packages was affixed with fascimile of the seal.

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Then a copy of the mahazar was given to A1 and A1 has given an acknowledgment. The mahazar is Ex.P.3.

4(iv) The seized properties were deposited with a forwarding memo in the godown of NCB Office. Forwarding memo is Ex.P.4 and the receipt is Ex.P.5. A report under Section 57 of the Act was submitted by P.W.1, which is marked as Ex.P.6. The said report was sent to Assistant Director Mr.s.Krishnamurthy as per Section 57 of the Act.

5. 5(i) P.W.2-Shanmugam, Intelligence Officer of NCB, Chennai, would state that before and after 01.10.1995 he was working as an Intelligence Officer of NCB. On 30.09.1995 at about 8.30 pm while he was working in the office his Assistant Director Thiru.Krishnamurthy has informed him that as per intelligence report near Egmore area about 3.00 kgs of heroin was concealed and a portion of it was kept in Door No.4, Longs garden, Pudupet, in a STD Booth by name 'Kavitha Telecom'. At that time it was 10.30 pm and the said STD Booth was found to be locked and when this fact was informed to his Assistant Director through wireless, who had asked him to stay in the same place to conduct surveillance and as per his direction he (P.W.2) spent the night there itself and on the following morning i.e., on 1.10.1995 at about 8.15 am, A2 and A3 came there with an yellow colour polythene bag and they opened the door of the STD Booth with a key and that he conveyed the said information to the Assistant Director.

5(ii) The Assistant Director has also informed P.W.2 to be ready to conduct a search in the STD Booth and for the said purpose he has requested him to arrange two government witnesses. When he approached the nearby residents requesting them to be a witness for search to be conducted in the said STD Booth, they refused. Immediately he contacted his Assistant Director and informed about his inability to secure two witnesses. Assistant Director inturn informed that he is conducting a house search at Pudupet in the presence of two witnesses and he will bring them to the said STD Booth and the search can be conducted in their presence. The Assistant Director and the first accused along with some officials came to STD Booth at about 8.45 am and as per the instructions of the Assistant Director he served a summon to A1 who had informed him that he will accompany P.W.2 to the office.

5(iii) When STD Booth was searched, they could find A2 and A3 in the Booth. Ex.P.7 is the summon issued to A1 by showing his identity card, P.W.2 informed that in the presence of two witnesses he is going to conduct search in the said STD Booth under the NDPS Act. When it was informed by P.W.2 to A2 & A3 if they want they can conduct a search on the witnesses and the officials who were present their. When the mandatory provisions under Section 50 of the Act was complied with by informing the accused whether they want the search to be conducted before a Judicial Magistrate or before a Gazetted Officer, A2 and A3 replied that

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there is no necessity for it and informed P.W.2 that he (P.W.2) himself can conduct the search. Anyhow, the said search was conducted before the Government Gazetted officer, Mr.S.S.Krishnamurthy, who was working as the Deputy Director of NCB. In search he could find a yellow colour polythene bag in the second drawer of an iron table, which was identified by P.W.2 as the son brought by A.2. When the said yellow bag was opened he could see two big packets in it. When the said packets were opened he could see a cloth bag which contained two polythene bags inside. P.W.2 could see brown colour powder in two polythene bags. When he enquired about this both A2 and A3 replied that it was heroin. The first bag weighed 1 kg. The second bag on measuring also weighed about 1 Kg. Two samples weighing each 5 grams were taken from the seized contraband and placed it in a paper cover and sealed the same after assigning the mark P1 in the cover. M.O.10 is the said cover. From the second bag also he took two samples weighing each 5 grams and also has kept the same in a paper cover and sealed the same. M.O.11 is the said bag. He has also assigned S3 and S4 to the samples taken from the two packet. Both the accused and P.W.2 have singed in the property recovered.

5(iv) He has also prepared inventory for the material objects seized by him, which was marked as Ex.P.3. Ex.P.3 was also sealed with NCB seal. S1 and S2 are M.O.12 and 13. The packing materials are Ex.P.16 and he, two witnesses and the accused were singed in the same. He has also enquired A2 and A3 about the source through which they got the contraband (subject to the objection raised by the other side). The accused have informed the Court that both A2 and A3 along with A1 had purchased 3 ½ kgs of heroin from A4 and both A2 and A3 had admitted that a portion of the heroin thus purchased was with the possession of A1 and remaining portion of the heroin is with them(A2 & A3). A2 has handedover a visiting card of a hotel and informed that A4-Rajeshyam Sharma is residing in the said hotel. In the visiting card the name Rolex Hotel, NSC Bose Road, Chennai-1, was written in English and Hindi. A2-Murugan has informed P.W.2 that A4-Rajeshyam Sharma is residing at Room No.206 & 207 of the said hotel. The visiting card and other materials were seized under Ex.P.17-mahazar, in which both the accused and both the witnesses and P.W.2 have signed. P.W.2 soon served summons to both A2 and A3. Ex.P.8 is the mahazar for the contraband seized from A2 and A3. Ex.P.9 is the summon issued to A2 and Ex.P.10 is the summon issued to A3. Both A2 and A3 have also identified A1 and informed P.W.2 that the remaining contraband is only with him. P.W2 took A1 to A3 in his car to his office.

5(v) P.W.2 has handedover the material objects collected from the accused to the Assistant Director for safe custody in the godown in his office. For that purpose he has prepared a forwarding memo to his Assistant Director who arrived at the office at about 10.30 pm. After handing over the material objects along

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with memo he recorded the confession statement of A1 at 3.00 pm and recorded the confession statement of A2 at 4.00 pm. Since A2 is an illiterate the confession statement of A2 was recorded by A1 as narrated by him(A2). A3 has given a voluntary statement. Ex.P.11 is the confession statement of A1. Ex.P.12 is the confession statement of A2. Ex.P.13 is the confession statement A3. Ex.P.14 is the arrest card for A1. Ex.P.15 is the arrest card for A2. Ex.P.16 is the arrest card for A3. Ex.P.17 is the forwarding memo given by P.W.2 for the seized articles to be kept in the office godown. Ex.P.18 is the receipt issued ho him in the godown.

5(vi) He has arrested the three accused and kept in his custody and produced them before the Court for remand on the next day at about 2.00 pm. A1 to A6 were taken to the Judicial Magistrate at Mugapair. But after coming to know that the Metropolitan Magistrate of Egmore himself is empowered to remand the accused under the Act, he has produced A1 to A6 before the Metropolitan Magistrate for judicial custody. As per the orders of the Magistrate, he had produced the seized contraband before the Special Court for NDPS case, but as per the instructions of the Court he kept those seized properties in the godown in his office. He has submitted a report to his higher official under Ex.P.20 under Section 57 of the NDPS Act.

6. P.W.3-Mr.Shasthri, an Intelligence officer of NCB, Chennai, an empowered officer under NDPS Act, would depose that on 05.10.1995 he produced the material objects connected with this case before the Court, which caused to weigh the said material objects with the help of a balance brought by the Court staff. Thereafter, he produced the sample for chemical examination at customs house, Chennai, as per the directions of the Court. He filed an affidavit seeking custody of A4 to A6 for further interrogation and after completing the interrogation he surrendered A4 to A6 on 15.10.1995 before the Court. Ex.P.21 is the memo for surrendering the properties in the Court. Ex.P.22 is letter of direction to send the samples to the customs house for analysis. Ex.P.23 is for taking custody of A4 to A6 for interrogation. The voluntary statement of A4 to A6 is Ex.P.24 to Ex.P.26. The above said accused have given the statement in Hindi and English language and the translation was done by P.W.3 himself since he is conversant with both Hindi and English languages. A5 and A6 have also given correct names in Ex.P.24 to Ex.P.26. Ex.P.27 is the test memo. The copy of charge sheet and FIR collected from Hyderabad relating to A4 are Ex.P.28 and Ex.P.29 respectively. panchanama drawn at Hyderabad is Ex.P.30, which was marked subject to the objection. Ex.P.31 is the booking of travel tickets for A4 to A6 from Bhopal to Madras.

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7. 7(i) P.W.4-K.N.Sridaran is the Inspector of Customs and Excise Department at Ranipet. He was working in NCB as an Intelligence Officer at Chennai from 01.11.1995 to January 1997. He is an authorised officer under NDPS Act and under Section 67 and 42 of NDPS Act. He had issued summons to Mr.Samuvel Raj, owner of the STD Booth, viz. Kavitha Telecom, No.4, Langs Garden Road, Pudupet, Chennai. The said Samuvel Raj was asked to appear on 23.11.1995 at 2.00 pm to NCB Office, Chenni. Ex.P.32 is the served Memo.

7(ii) As per the summons, the said Samuvel Raj appeared himself in the said office on 23.11.1995 at 2.30 pm. He was asked to explain regarding the seizure of 2 kgs of heroin from the above said STD Booth, (Kavitha Telecom, No.4, Langs Garden road, Pudupet, Chennai) on 21.10.1995. Ex.P.33 is the statement of Mr.Samuvel Raj. According to him his brother Kattin Durai(A3) was in permissive occupation of the said STD Booth and the A1 and A2 used to visit the said STD Booth often. Samuvel Raj has also identified Sheik Mohammad, Murugan and Kattin Durai, in the photo shown to him by P.W.4 and he has also signed in the copy of the photo. Ex.P.33 is the xerox copy of the photo of the person identified as Kattin Durai and Ex.P.35 is the xerox copy of the photo of the person identified as Murugan and Ex.P.36 is the xerox copy of the photo of the person identified as Sheik Mohammad by the said Samuvel Raj.

7(iii) On 23.11.1995 P.W.4 issued summons to Azizur Rahman and Narayanan Nair, who are working as receptionist and Manager respectively in the Rolex Hotel at NSC Bose Road, Chennai, to appear before him on 24.11.1995 at 10.00 am. Ex.P.37 is the summon served on Azizur Rahman and Ex.P.38 is the summon served on Narayanan Nair. When Azizur Rahman was asked to say about the facts known to 4 ½ grams of heroin seized on 01.10.1995 at Rolex Hotel, he gave a statement(Ex.P.39). He ha further disclosed that on 29.9.1995 Room.No.206 was allotted to Rajeshyam Sharma and Room.No.207 was allotted to Sheyam in Rolex Hotel. He has further deposed to the effect that on 01.10.1995, Azizur Rahman was asked to be a witness for the seizure of the contraband in Rolex Hotel.

7(iv) He has also informed that Narayanan Nair was also requested by NCB to be a witness in the above said seizure. When Rejeshyam Sharma was staying in Room.No.206 of Rolex Hotel, the NCB officials interrogated him and at that time Rajeshyam Sharma produced from his pocket 4 ½ grams of heroin powder, was also stated in detail in the statement given by Azizur Rahman. Azizur Rahman has further disclosed in his statement that the name of the person who stayed in Room No.206 is not Rakesh, but it is Rajeshyam Sharma and the name of the person who stayed in Room No.207 was not Shyamlal, but Sathish Ramlal Ramlal. Azizur Rahman has also identified A4 to A6 in the xerox photo shown to him. Azizur Rahman has also produced checkin register and counterfoil of the receipt issued to the person who had stayed in Room.No.206 and

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207. Ex.P.40 to 42 are the xerox photo of A4 to A6 containing the signature of Azizur Rahman. Ex.P.43 is the xerox copy of checkin register. Ex.P.44 and 45 are the counterfoil receipts relating to Room No.206 and 207.

7(v) At the time of interrogation of Narayanan Nair, since he could not write his statement, Azizur Rahman wrote the statement given by Narayanan Nair. Narayanan Nair also identified A4 to A6 in the photos(Ex.P.47 to 49 respectively) and in proof thereof he has also signed in the said xerox copy of the photos. P.W.4 had issued summons to Sunil Kumar on 7.12.1995 requesting him to appear before NCB Office on 11.12.1995 at 2.00 pm. He has also given a voluntary statement narrating the incident. Ex.P.50 is the summon issued to Sunil Kumar and his statement is Ex.P.51. Sunil Kumar know to speak Tamil, but he cannot write the same. The statement given by Sunil Kumr was reduced to writing by P.W.4 and he obtained the signature of Sunil Kumar after he readover the contents in the statement and obtained the signature in the xerox copies of the photos of A1 to A3, which were shown to Sunil Kumar, who had identified them and signed in those photos. They are Ex.P.52 to 54.

8. 8(i) P.W.5-C.Rangarajan is the Inspector of Central Excise at Bombay. He was on deputation during September, 1995 till December, 1995 in NCB Chennai as intelligence officer. He is an empowered Officer under NDPS Act. On 30.09.1995 at 9.00 pm an intelligence was gathered to the effect that one Rajeshyam Sharma has brought about 3 ½ kgs of heroin for supplying the same to Sheik Mohammad and Murugan. Sheik Mohammed was living at No.57, Labbai Street, Pudupet, Madras, and Murugan was residing at No.3, Ellappan 1st cross Street, and that Murugan and Shiek used to go to Kavitha Telecom situated at No.4, Langs Garden Road, Pudupet, and if these premises were searched, the contraband can be recovered and that an Intelligence Report(Ex.P.1) was prepared to that effect and submitted to the Assistant Director for information.

8(ii) The Assistant Director asked P.W.5 to go to to Rolax Lodge where Rajeshyam Sharma was residing in Room.No.206, along with his carriers staying at NO.207. At about 11.00 pm on 30.09.1995 P.W.5 and his colleague Gopalan proceeded to Rolax lodge and stayed there till early morning of the following day. At 10.00 am on 01.10.1995, P.W.3-Mr.S.S.Krishnamurthy, Assistant Director of NCB, came there and P.W.5 and his colleague informed that none came out from the lodge Rooms No.206 & 207. P.W.5 along with his colleague went to the receptionist and confirmed the availability of persons who booked the Rooms No. 206 & 207 in them. Azizur Rahman, the receptionist, was requested to be a panch witness and he also agreed for the same. Narayanan Nair an employee of the lodge also agreed to be a panch witness. The above said panch witnesses were informed about the Intelligence received and their

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proposal to search Room.No.206 & 207 situated at their floor in Rolax Lodge.

8(iii) When the door of Room.No.206 was knocked at, the accused Rajeshyam Sharma opened the room from inside. The accused Rajeshyam Sharma(A4) was indentified by P.W.5 in the court. After revealing their identity Rajeshyam Sharma was requested to subject himself for a personal examination, for which there was no resistance from Rajeshyam Sharma(A4). When it was informed to Rajeshyam Sharma(A4) that his room is going to be searched, he declined the offer. P.W.5 also offered him and explained his right to be searched in the presence of a Judicial Magistrate or a Gazetted Officer. A4 waived the rights. The said right was explained to A4 in Hindi by P.W.5 and in Tamil by Gopalan, a colleague of P.W.5, to two panch witnesses. When the search was on progress in the room of A4 he took out a small polythene packet from the right side pocket of his pant. When the paper of the packet was unwrapped P.W.5 could see brown powder in it. When the powder was tested with the help of field test kit, which answered for the presence of heroin, a narcotic drug.

8(iv) When the door of Room No.207 was knocked at, the accused Sathish Ramlal(A5) was present, who was idendified by P.W.5 in the Court. After introducing P.W.5, A5-Sathish Ramlal was informed about his right of being searched before a Judicial Magistrate or a Gazetted Officer, but the said right was waived by A5-Sathish Ramlal. On such search of Room No.207 nothing was recovered. Again P.W.5 came to Room No.206 and weighed the recovered powder through a balance which was brought with him. It weighed approximately 4.5 grams. It was packed and sealed with Serial No.4 of NCB. The packed cover was marked as PS.1. A mahazar was prepared in the presence of panch witnesses for the recovery of the above said heroin. The mahazar was readover by Gopalan in Tamil and P.W.5 in Hindi to all the witnesses and the accused and the said mahazar is Ex.P.55. Ex.P.56 is the visiting card recovered from Room No.206. The accused and panch witnesses and Mr.Gopalan, the officer, who has seized the contraband and the Assistant Director have signed along with P.W.5 in the Mahazar.

8(v) The property cum sample cover marked as PS1 contains the contraband about 4.5 grams of heroin voluntarily handed over by Rajeshyam Sharma and the cover contains the signatures of the panch witnesses and the accused Rajeshyam Sharma. The cover was produced before E.O.II on 02.10.1995. The said cover is M.O.18. After drawing the mahazar P.W.5 issued summons to Rajeshyam Sharma(A4), Sathish Ramlal (A5) and Mohanlal Ramlal. They received the summons issued them and acknowledge the receipt of it. The summons issued to them are Ex.P.57 to 59 respectively. They voluntarily came to our office along with P.W.5. Raheshyam Sharma(A4) gave his voluntary statement at about 2.00 pm. Ex.P.60 is the statement given by Rajehsyam Sharma(A4). The said statement was written by

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him in Hindi in the presence of P.W.5. He voluntarily handed over Hotel Rolax Temporary advance receipt Ex.P.61, Railway Ticket Ex.P.62, and the surcharge railway receipt bearing No.125022 is Ex.P.62. The railway ticket is journey ticket from Bhopal to Madras central by Tamil Nadu Express on 28.09.1995 for three persons. The copies of FIR and the charge sheet pertaining to his case pending in Hyderabad was handed over to P.W.5 by Rajeshyam Sharma(A4), Which is Ex.P.28.

8(vi) Rajeshyam Sharma(A4) had informed P.W.5 that he had brought heroin of 3 ½ kgs to be supplied to A1 and A2. According to Rajeshyam Sharma(A4), on 30.09.1995 at about 10.30 am A2-Murugan came to Rolax Lodge and collected the entire heroin from him. He identified A1 , A2, A5 an A6. In Ex.P.60, A1, A2, A4 to a6 have signed. Ex.P.60 was written and readover to him(A4) and signed by him(A4). The corrections made in Ex.P.60 was initiated by A4. He has signed in all the pages and the document was attested by P.W.5. On 01.10.1995 at about 3.30 pm all the formalities were over and at about 3.45 pm, P.W.5 started recording the voluntary confession statements of Sathish Ramlal(A5) and it concluded at 5.00 pm. A5 identified A4 who brought him to Chennai as a carrier of the contraband. Ex.P.64 is the statement given by A5 and recording of statement of A5 was over by 5.00 pm. At 5.15 pm on the same day A6 gave voluntary statement before P.W.5. Since he is not conversant in writing Hindi, he asked his brother A5 to write his statement. Ex.P.65 is the statement of A6. At its bottem A5 has also endorsed. The recording of statement of A6 was concluded at 6.30 pm. Since P.W.5 got himself satisfied that a prima facie case has been made out against A4, A5 and A6, he arrested them. Ex.P.66 to 68 are the arrest memo issued by P.W.5. A4 to A6 have signed in the respective arrest memos. After arresting them, P.W.5 prepared a report under Section 57 of the NDPS Act and forwarded the same to the Assistant Director, his immediate superior officer. Ex.P.69 is the said report. P.W.5 handedover A4 to A6 to the Investigation Officer on 01.10.1995 at 7.45 pm.

9. 9(i) P.W.6-Ms.V.Saratha, the Assistant Chemical Examinor in the customs laboratory, Chennai, is a post graduate decree holder in M.Sc. Chemistry. She is having a vast experience in the said job for the past 32 years. She is a recognized chemical analyst. She had received a requisition-Ex.P.22 from the Court along with a test memo-Ex.P.27 through her office. A person by name M.V.S.S.Sasthri had brought five covers with court seal and NCB seal. All the said covers were received at the laboratory after assigning serial Numbers of registration. The seals found in the five paper packets were in good condition.

9(ii) When the said five packets were opened, she could see a plastic cover in each packet and each cover was containing brown powder. She has weighed all the five plastic covers

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including the brown sugar separately with the help of electrical balance available in her office. She has also weighed each packets separately through the same electrical balance. In cover marked as S1, which was exhibited as M.O.1, she had marked her office No.301 with date 6.10.1995. The total weight of the brown powder of the plastic cover weighed 6.02 grams. After taking samples for chemical examination, the remaining powder along with plastic cover was weighed and repacked and returned to the Court by affixing the office seal, ie. M.O.1. In the said marking S.3 was noted with blue ink on the surface of the cover. It was also assigned office No.302 with date 6.10.1995. When the cover was weighed with plastic, it weighed 6.00 grams. When the cover reweighed after the sample powder was taken for chemical examination, it weighed 5.43 grams along with plastic cover. The said cover was once again returned to the Court with office seal. The said cover is M.O.3. It was marked as S.1 in green ink.

9(iii) When the brown powder in the plastic packet weighed 5.98 grams, it was assigned office No.303 dated 6.10.1995. When the brown powder along with the plastic packet after the sample for chemical examination was taken weighed 5.25 grams. The said brown powder was once again placed in the paper cover and sealed with office seal and then sent to the Court, ie. M.O.2. On the said cover it was marked as S3 in green ink and laboratory NO.303 and date 6.10.1995 were superscribed on the cover. When the plastic cover was weighed along with brown powder it weighed 6.506 grams. When it was weighed after sample powder was taken for chemical examination it weighed 5.63 grams. The balance brown powder was placed in the same paper cover and returned to the Court after affixing their office seal on the cover, ie., M.O.14. Office No.305 was assigned over the cover which was marked as PS.1. When the brown powder was weighed along with the plastic cover, which was superscribed with date 6.10.1995, it measured 4.52 grams. After taking the sample powder, the remaining powder when weighed with plastic cover, it weighed 4.2 grams. The said powder was again placed in the same cover and after affixing the office arrack seal on the cover, it was sent to the Court, ie. M.O.18.

9(iv) When the sample contraband powder from five packets were tested, the test answered for heroin, a narcotic drug. The chemical name for the same is Diacetyl Morphine. Ex.P.70 is the interim report dated 19.12.1995 sent by her. After completing the entire chemical examination, he had sent the analysis report dated 8.3.1996 with her final report to the Court, which is Ex.P.71. She has further stated in the final report dated 8.3.1996 below her signature by inadvertently she had put the date as 8.6.1993 instead of 8.3.1996. She has further stated that in Ex.P.71 she has noted the percentage of the presence of Diacetyl Morphine in the samples taken for analysis. In Ex.P.70-report, mentioning as "two of them S2" has been a typographical mistake, it should have been read as S.3 instead of S2. On 8.3.1996, Intelligence Officer of NCB

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Mr.Gopalan came to the laboratory and received the five sealed covers from their office for handingover the same to the Court.

10. P.W.7-Mr.C.Narayan Nair, an independent witness for the seizure of contraband from A4 at Rolax Lodge, turned hostile.

11. P.W.8, Mr.Gurusamy, after having admitted his signature in Ex.P.3 and Ex.P.8 mahazars has not supported thecase of the prosecution. Hence, he was also treated as a hostile witness by the prosecution.

12. 12.(i) P.W.9-Mr.S.S.Krishnamurthy, is the Investigation Officer in this case. P.w.9 in his evidence has deposed that he is working as an Assistant Director in NCB, South Zone, Chennai, who is a gazetted officer. He has been empowered under Section 41 (2) of the NDPS Act to assign work to his subordinate officers. P.W.9 would depose that he gave instructions to intelligence officer Rangarajan, Vijayalakshmi and Sasthri, on the basis of the intelligence report he received on 30.09.1995 at about 9.00 pm. He has given instructions to the above said intelligence officers regarding the steps to be taken on the basis of the said intelligence report. As per his instructions, the officers were divided into three groups and sent to three different places for the purpose of Surveillance. Intelligence officer Vaithiyanathan was sent to the hosue of A1-Sheik Mohammad for the purpose of surveillance and intelligence officer Shanmugam was sent to STD Booth by name Kavitha Telecom for the purpose of surveillance and Mr.Rangarajan, intelligence officer, was sent to Room.No.206 & 207 in Rolax Lodge for the purpose of making surveillance in respect of the persons staying in the said rooms in the said lodge. P.W.9 has supervised the surveillance made by the above said three officers. On 01.10.1995 morning he went to A1's house along with intelligence officer Vijayalakshmi (P.w.1). The intelligence officer Vaithyanathan has secured two independent witnesses as per his instructions. P.W.9 along with Ms.Vijayalakshmi entered into the house of Sheik Mohammed(A1) and conducted the search. From a portion of A1's house he had seized 1.500 kgs of heroin, a narcotic drug, in the presence of A1.

12(ii) While he was indulged in the seizure of heroin in A1's house, he received information from the other two places from where he had sent the intelligence officers for the purpose of surveillance. Mr.Shanmugam, intelligence officer sent for taking surveillance at STD Booth (Kavitha Telecom) has informed that A2 and A3 have come to the said STD Booth. P.W.9 has informed Shanmugam that as per the intelligence report he had received there is every possibility for A2 & A3 to possess 2.00 kgs of heroin powder. P.W.9 has further instructed the intelligence officer Shanmugam to procure two independent witnesses to conduct a search in the said STD Booth, where he will come shortly. After

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completing the seizure of 1.500 kgs of heroin at A1's house, P.W.9 proceeded to the STD Booth (Kavitha Telecom) where intelligence officer Shanmugam, who had informed that no one has comeforward to stand as a witness for the search and hence, he had asked Mr.C.Narayanan Nair(P.W.7) and Gurusamy (P.w.8), who stood as witnesses for the seizure of the contraband in A1's house, to be a witness for the search and seizure to be conducted in STD Booth (Kavitha Telecom), for which the above said witnesses have also agreed. P.W.9 immediately went to Kavitha Telecom STD Booth along with the two witnesses and A1 and other officers.

12(iii) After consulting with Shanmugam, intelligence officer, he had conducted search in accordance with the provisions of the NDPS Act. From the drawer of the iron table kept inside Kavitha Telecom STD Booth, an yellow coloured Polythene bag containing two packets which contain heroin weighing 2 kgs were found. When he enquired about this with A2-Murugan and A3-Kattin Durai, they informed that Rajeshyam Sharma, who is residing at Rolax Lodge Room No.206 had handedover to them 3.500 kgs of heroin out of which they gave 1.500 kgs heroin to A1-Sheik Mohammed and remaining 2.00 kgs of heroin was kept with them. After confirming the fact of staying of Rajeshyam Sharma in Room.No.206 at Rolax Lodge from the officer who was on the duty of surveillance in Rolax Lodge, P.W.9 proceeded to the said lodge after sending the intelligence officers Ms.Vijayalakshmi and Shanmugam to the NCB office along with A1-Sheik Mohammed, A2-Murugan and A3-Kattin Durai, P.W.9 along with the intelligence officer on surveillance duty at Rolax lodge went to Room.No.206 where he found Rajeshyam Sharma(A4) and also ascertaining the fact that two persons associated with A4, in carrying the narcotic drug, are residing at Room.No.207 in the same Rolax Lodge, he placed two NCB officers in front of the above said two rooms for the purpose of guarding the same. When the door of Room.No.206 was tapped by P.W.9, the same was opened by the inmate. He had conducted search in Room.No.206 & 207 in accordance with the provisions of law. At that time A4-Rajeshyam Sharma informed him about his stay in Mansaur and also his association with A1-Sheik Mohammed and A2-Murugan and also informed that on 30.09.1995, morning he gave 3 ½ kgs of heroin. When P.W.9 was about to conduct search on the person of A4-Rajeshyam Sharma, he(A4) voluntarily comefarward and produced a small cover from his right pant pocket, which contained 4.5 grams of heroin powder. A4 has brought Sathis Ramlal (A5) and Mohanlal Ramlal(A6), the other two associates of A4. P.W.9 returned to his officer along with A4 to A6 and recorded the statements of A4 to A6.

12(iv) P.w.9 had arrested all the accused and remanded them to judicial custody. The seized contraband were kept in the godown which was under the control of P.W.9. The seized contraband were sent to the Court along with the accused at the time when the accused were sent for remand. He has submitted a report to his

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superior officer as per Section 57 of the NDPS Act. P.W.9 has made arrangements to conduct a detailed enquiry on the basis of the statement given by the accused and also on the basis of the contraband seized from them. After completing the investigation he has preferred a complaint to the Court. Ex.P.72 is the report submitted by him under Section 57 of the NDPS Act to his higher officials. Ex.P.73 is the forwarding memo for having sent 4.5 grams of heroin to his godown. Ex.P.74 is the godown receipt No.10/95. Ex.P.75 is the report under Section 57 of the NDPS Act submitted by Mr.Gopalan, an intelligence officer, who had conducted surveillance at Rolax Lodge and he has also identified A1 in the Court, who alone was present on the date of examination of P.W.1 on 7.8.1997.

13. On the basis of the above said evidence, incriminating circumstances under Section 313 of Cr.P.C. were put to the accused. They denied their complicity with the crime. A1 to A6 would retracted their confession by saying that their confession were obtained by NCB officials under threat and torture. To substantiate this contention, the accused have also examined the Doctor who had treated A1 to A4, as D.W.1, in central jail hospital. The nominal register was filed as Ex.D.1.

14. After going through the evidence both oral and documentary, the learned trial judge has come to a conclusion that the guilt against the accused under Section 8(c) r/w 21 and 29 of the NDPS Act was not proved beyond any reasonable doubt and consequently he has acquitted all the accused from the charges levelled against them. Aggrieved by the findings of the learned trial Judge, the State has preferred this appeal.

15. Now the point for determination in the appeal is whether the Judgment of the trial Court are palpably wrong, manefestly erroneous or demonstrably unsustainable warranting interference by this Court in the findings of the trial Court of acquittal of all the accused in C.C.No.631/1995 on the file of the Court of Special Judge, for NDPS Act cases, Chennai?

16. The point:- I have heard the learned Mr.N.P.Kumar, Special Public Prosecutor for the appellant/state and Mr.Rajarathinam, Amicus Curea, for the respondents/accused and considered their rival submissions.

16 (i)The charge levelled against A1 to A6 is under Section 8(c) r/w 21 and 29 of the NDPS Act. The first allegation of the prosecution is that A1 to A6 entered into a criminal conspiracy to procure 3.5 kgs of heroin from Mandsaur (M.P), transport it to Chennai and from here to illegally export it out of India. The second charge under Section 8(c) r/w 29 NDPS Act (it should be under Section 21 of NDPS Act), is that A4 to A6 procured 305 kgs of heroin from Mandsaur in September 1995 and transported

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by road to Madras. Third charge is against A1 and A2 under Section 8(c) r/w 21 of the NDPS Act. According to the third charge A2 received 3.5 kgs of heroin from A4 and handed it over to A1. From 3.5 kgs, A1 gave A3, 2 kgs for safe custody. Fourth charge is under Section 8(c) r/w 21 against A1 for having found in possession of 1.5 kgs of heroin on 1.10.1995 at his residence in Pudupet. Fifth charge is under Section 8(c) r/w 21 against A2 and A3 for having found in 2 kgs of heroin on 01.10.1995 in Kavitha Telecom, Pudupet.

16(ii) The learned counsel appearing for the appellant/State would contend that the trial Court has acquitted the accused for the following reasons:- As per Section 42(2) of the NDPS Act, if an officer commences investigation on the basis of any information he had received, he shall within 72 hours send a copy thereof to his immediate superior officer, but in his case without following the provisions contemplated under Section 42(2) of the NDPS Act, P.W.9 has commenced the investigation. The learned Special Public Prosecutor would contend that Ex.P.1 is not an information on which P.W.9 has investigated the case, but Ex.P.1 is an intelligence report received at the office of NCB, on the basis of which it was submitted by P.W.1 to her immediate superior officer viz., the Assistant Director of NCB, Chennai, P.W.9, who had given permission to take further action on the basis of the intelligence report Ex.P.1 to P.W.1. The learned Special Public Prosecutor in this connection relied on a case reported in 2001 MLJ (Crl) 680 [1.M.Mahendran @ Nithiya @ Nidhi, 2. S.Bhaskar (Appellants in C.A.643/97), 1.S.S.M.Rajanayake, 2.Prasanth Ajeeth (Appellants in C.A.644/97), 1.A.Amal Doss @ Ranga @ Ravi, 2.Vijayakumar @ Kumar (Appellant in C.A.890/97) Vs. State rep by Intelligence Officer, NCB, South Zone, Chennai, respondent in all the appeals/complainant), and contended that the provision of Section 42(2) of the NDPS Act has not been attracted in this Case because P.W.9 has proceeded with the investigation not on the basis of any information received, but on the basis of Ex.P.1-intelligent report. The relevant observation by the learned judge of this Court in the above said dictum runs as follows:

> "There is no prohibition under the Act that an empowered Officer cannot initiate proceedings on the basis of materials gathered other than by way of information or personal knowledge. There could be very many circumstances where an empowered offier cold come across a violation of the provisions of the NDPS Act without there being any information about the same or not based on his own personal knowledge. Therefore such f those exceptional category of cases would fall out side the purview of Section 42 of NDPS Act. In this context, reliance can be placed upon the Judgment of the Honourable Supreme Court reported in 2000 (7) SCC page 632 (KARNAIL SINGH versus STATE OF RAJASTHAN).

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In paragraph 8 of the said Judgment, the Honourable Supreme Court was pleased to observe that

> "..... for attracting the applicability of Section 42, it is necessary that the Officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information regarding the movement of narcortic drug or psychotropic substance. However, if the action is taken not upon his personal knowledge or information, the requirement of Section 42 would not be applicable. In the case on hand, as found by me, the Intelligence Report need not necessarily be taken as the one based on information and the case of the prosecution that the same was not based on information, but only on the basis of materials gathered through the Intelligence and where there is every reason to believe the said case put forth by the prosecution, I hold that Section 42 was not attracted to the case on hand."

The above dictum squarely applies to the present facts of the case. In the case on hand also the NCB officials have proceeded with the investigation only on the basis of Ex.B.1-intelligence report and not on the basis of any information as contended by the learned counsel appearing for the respondents to attract the violation of the provisions under Section 42(2) of the NDPS Act.

16(iii) The learned counsel for the respondents in the course of his argument focus the attention of this Court to the evidence of P.W.9 in the cross-examination of A4 to A6, wherein P.W.9 has stated that the intelligence officer who are working under him have acted upon the information they received and that apart from Ex.B.1-intelligence report, he has also received other information also and out of them some of the information have been recorded and some of the information were given orally. Relying on the above said evidence of P.W.9 in the cross-examination, the learned counsel for the respondents/accused would contend that there is violation of the provisions contemplated under Section 42 of the NDPS Act. But, P.W.9 in the second chief-examination has categorically deposed to the effect that some of the information he has received were not worthwhile to take any further action and they are not so important to be informed to the Court and that except the intelligence report under Ex.P.1, there is no other information received by him of any use to take any further action in the matter. Hence, they relied only on Ex.P.1-intelligence report in this case to take further action. Under such circumstances, as correctly pointed out by the learned Special Public Prosecutor, the findings of the learned trail Judge that the prosecution has filed to follow the provision under Section 24(2)

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of the NDPS Act, which is vital to the prosecution case, cannot be sustainable in lieu of the ratio decidendi laid down in 2001 MLJ (Crl) 680.

16(iv) The learned trial Judge has thrown out the case of the prosecution on the ground that there is a violation of the provisions contemplated under Section 57 of the NDPS Act. Section 57 of the NDPS Act runs as follows:

> "Report and arrest and seizure:- Whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior"

The learned counsel appearing for the respondents/accused would contend that P.W.1, 2 and 5 have submitted the intelligence report Ex.B.1for further action to Assistant Director who is not an immediate superior officer. The learned Special Public Prosecutor would submit that P.W.1 and 5 who have signed in Ex.B.1-intelligence report have submitted the same to P.W.9, the Assistant Director of NCB, Chennai, who is a superior officer available at the relevant point of time since, the immediate superior officer viz. Superintendent of NCB was on leave and no officer was posted at the relevant point of time. P.W.5, Intelligence Officer of NCB, who has also signed in Ex.P.1-intelligence report in his deposition dated 30.7.1997 to the cross-examination of A4 to A6 has admitted that the next superior officer in the office is the Superintendent of NCB and in September 1995 there was no Superintendent in their office and by the time when Ex.P.1-intelligence report was recorded, it was brought to the next superior officer viz. P.W.9, the Assistant Director, with whom the intelligence officers who have signed in Ex.P.1 had discussion on 30.9.1995 till 11.00 pm and as per the directions of the superior officer viz. P.W.9 further steps were taken in three places as directed by him. P.W.1, who had conducted search and recovery of 1.500 kgs of brown powder (heroin) from the house of A1, has submitted that a report under Section 57 of the Act, which has been exhibited as Ex.P.6, to her superior officer viz. The Assistant Director of NCB, P.W.9. P.W.5, who had conducted search and recovery of 4.5 grams of narcotic drug (heroin) from A4 in Room No.206, Rolax Hotel, has submitted a report under Section 57 of the NDPS Act to his superior officer viz. Assistant Director, P.W.9, under Ex.P.69. P.W.2, who has recovered 2 kgs of heroin from A2 and A3 from Kavitha Telecom STD Booth, has submitted Ex.P.20-report under Section 57 of the NDPS Act to his superior officer viz. Assistant Director, P.W.9. So the findings of the trial Court that the provisions contemplated under Section 57 of the NDPS Act was not properly followed is not sustainable.

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16(v) The point raised by the learned Amicus Curiae appearing for the respondents/accused is that the independent witnesses examined on behalf of the prosecution viz. P.W.7 & P.W.8 have not supported the case of the prosecution and hence, he would contend that the recovery of contraband made from A1 to A4 cannot be believed at all. To contravert the submission made by the learned Amicus Cure appointed to defend the accused by the Court, the learned Special Public Prosecutor relying on a decision reported in 2003(8) Supreme 62 (P.P.Fathima Vs. State of Kerala) contended that merely because panch witness had not supported the case, is no reason to reject the prosecution case if otherwise evidence regarding seizure was acceptable.

16(vi) It is the definite case of the prosecution that on the basis of Ex.P.1-intelligence report, P.W.1 along with P.W.9 proceeded to the house of A1 situated at Door No.57, Labbai Street, Pudupet, Chennai, and after following the mandatory provisions contemplated under Section 50 of the NDPS Act, had conducted a search after A1 had waived his right under Section 50 of the NDPS Act. The above search being conducted before a Gazeted officer or before a Judicial Magistrate, the search was however conducted in the presence of P.W.9, a Gazetted officer, who happened to be the Assistant Director of NCB, as a result of the search, from an unsused kitchen in the second floor, a cloth bag was found, which contained polythene covers in which two packets containing brown powder were recovered and one bulk packet weighed 1 kg of heroin and the other packet weighed 500 grams of heroin. When a small portion of the contents of the said bag were tested with the help of test kit, they answered for the presence of heroin, a narcotic drug. All the formalities were duly followed in seizure of the contraband under Ex.P.3 by P.W.1 and P.W.9 and they were sent to the chemical laboratory at customs house for chemical analysis. The seizure of contraband from A2 and A3 were also made by P.W.2, intelligence officer of NCB, in the presence of P.W.9, who after completing the seizure in A1's house had proceeded to STD booth at Door No.4, Langs Garden road, Pudupet, Chennai, from where P.W.2 was in surveillance from 30.09.1995 night 10.30 pm and had also informed about the arrival of A2 and A3 on 01.10.1995 at 8.15 am to P.W.9. After following the mandatory provisions contemplated under Section 50 of the NDPS Act and after A2 and A3 have waived their right and agreed for the search being conducted before a Gazetted officer viz. P.W.9, an yellow bag was seized from the drawer of an iron table present in the above said STD Booth room, which contained two polythene covers weighing each 1 kg. When sample was taken and tested with the help of the test kit, it was revealed that the seized contraband is heroin, a narcotic drug. After following all the procedures, the above said contraband was seized under Ex.P.8-mahazar.

16(vii) P.W.5, who was sent by P.W.9 to conduct surveillance at Rolax Hotel Room No.206 & 207 along with his

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colleague Gopalan, conducted surveillance just opposite to the lodge from 11.00 pm at 30.09.1995 till 10.00 am on 1.10.1995 and after informing P.w.9 that no one has come out of the lodge Room No.206 and 207, thereafter contacted receptionist of the Rolax lodge for confirming the availability of presence who took the room.No.206 & 207 and after securing P.W.7-Narayanan Nair and another witness Azizur Rahaman, the receptionist as panch witnesses, conducted the search in the above said rooms after following the mandatory provisions contemplated under Section 50 of the NDPS Act, for A4-Rajeshyam Sharma, an occupant of the room.No.206 for the search being conducted in the presence of a Judicial Magistrate or a gazetted officer, P.W.5 began to conduct the search, A4-Rajeshyam Sharma, took out a small polythene packet from his right side pocket of his pant. The said packet weighed 4.5 grams. When a small quantity was tested with the help of field test kit, it answered the presence of heroin. When a search was conducted in Room No.207 where A5 and A6 were found in occupation, nothing was recovered. After following the formalities for packing and sealing the seized contrabands, the contrabands seized under mahazar Ex.P.55, were sent to chemical laboratory at customs house for chemical examination.

16(viii) So, the recovery of the contraband from A1 under Ex.P.3, from A2 & A3 under Ex.P.8 and from A4 under Ex.P.55 are made after following all the mandatory provisions of law. The officer who have seized the above said contraband have meticulously followed the mandatory provisions contemplated under section 50 & 57of the NDPS Act. So, the fact that P.W.7 and P.W.8, independent witnesses, have merely not supported the case of the prosecution will not lead us to reject the entire case of the prosecution, since the evidence of the other witnesses regarding the seizure has been proved beyond any reasonable doubt in this case. The above proposition of law has been reiterated in 2003 AIR SCW 4975 (M.Prabhulal s. Assistant Director, Directorate of Revenue Intelligence), which runs as follows:-

> "Learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in pradeep Narayan madgaonkar and others v. state of Maharashtra (1995 (4) SCC 255). In the decision relied upon while observing that prudence dictates that evidence of police witnesses need to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particularly should be sought. In that case the observations were made in the light of the fact that

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the police officials made an attempt to create an impression on the Court that the two witnesses were witnesses of locality and were independent, knowing fully well that one of the witnesses was under the influence of the police and available to police as he had been joining the raids earlier also and other witness was a close associate of the said already available witness. The friendship between the two witnesses developed during the days of gambling when the police having admittedly conducted a raid at their den. In was observed that the very fact that the police officer joined the said two witnesses creates a doubt about the fairness of investigation coupled with the manner in which the statements had been recorded in that case. The observation relied upon have no applicability to the facts and circumstances of the present case particularly having regard to the confessional statements of the appellants which we have held were voluntary. On the facts of the case, recovery cannot be doubted for want of non-examination of independent witnesses."

In the case on hand from the above dictum the case of the prosecution cannot be branded as a put up case on the mere fact that P.W.7 and P.W.8 independent witnesses turned hostile but, the entire case of the prosecution hinges upon the evidence of NCB officials alone. There is no animosity attributed against the NCB officials who have been cited as witnesses in this case to foist a case of this nature against A1 to A6. Further more the witnesses herein have recorded voluntary confession statements of the accused A1 to A4, which are Ex.P.11 (A1), Ex.P.12 (A2), Ex.P.13 (A3) and Ex.P.24 (A4).

16(ix) The learned Amicus Curiea appearing for the accused would contend that the above said confession statement cannot be relied on because they were obtained under coercion and threat and also under bodily violence and torture. The learned Amicus Curea in support of his contention relied on the evidence of D.W.1, Dr.S.kathivel, who was working as Assistant Surgeon at Central Jail Hospital, Chennai, during the relevant period. He has also produced nominal register which was marked as Ex.D.1. According to D.W.1 he had examined A1 to A3 on 3.10.1995 i.e., subsequent to the date of remand by the Judicial Magistrate on 2.10.1995. It is seen from Ex.P.66 to 68 that the accused were arrested on 01.10.1995. From Ex.P.14 to 16, it is seen that A1 to A3 respectively were arrested on 1.10.1995. Ex.P.19 is the remand report relating to all the accused, which shows that A1 to A6 were remanded to Judicial Custody on 2.10.1995 at 11.30 am. In the above remand report it has been specifically endorsed by the Magistrate, who had remanded A1 to A6 to the Judicial custody to the effect that no complaint of ill-treatment was made against NCB

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officials". Under such circumstances, we cannot come to the conclusion that the above said confession statements viz. Ex.P.11 to 13 relating to A1 to A3 respectively and Ex.P.24 to 26 relating A4 to A6, have been obtained under threat, coercion and torture on the basis of the evidence of D.W.1, the Doctor, who had admitted examined A1 to A3 only on 3.10.1995. If there was any bodily injury found on the accused the prison authority would not have admitted the accused inside the prison without being treated by a doctor. There is absolutely no evidence on record to show that the accused have been tortured by NCB officials in getting the above said confessional statements viz. Ex.P.11 to 13 and 24 to 26.

16(x) The learned Admicus Curea appearing for the accused/respondents pointed out that the trial Judge has disbelieved the seizure of contraband from A1 on the ground that only from an unused kitchen 1.500 kgs of heroin was said to be seized and the prosecution has failed to prove that A1-Sheik Mohammed was found in "conscious physical possession" of 1.500 kgs of heroin powder. The learned Amicus Curiae for this proposition of law relied on JT 1996(2) SC 636 (Mohd.Alam Khan Vs. NCB & Another). The facts of the above said case in brief are as follows:-

> "On information NCB, Bombay, conducted a raid at the residence of the appellant situated at second floor, S.M.Mansion, 299 Bellasis Road, Bombay, and seized some incriminating documents along with cash amount of Rs.45,000/-. In connection with the seizure the accused/appellant was brought to NCB office at Bombay for the purpose of interrogation. Further information was received to the effect that the appellant was trafficking in narcotic and psychotropic drugs in a big way and that he had stored Mandrex tablets numbering 50,000 to 60,000 in an house. In the course of the search and seizure of the said premises along with the contraband tablets, an agreement dated 9.3.1989 supposed to have been signed by the appellant in favour of the promotor/builder was also seized by the officials. Only on the basis of the abvoesaid agreement, the accused was roped into the offence on the ground that the building from where the above said narcotic drug and contrabands were seized. While disposing of the appeal, the Honourable Apex Court observed as follows:-
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> > "The High Court was not right in holding that the learned Trial Judge was therefore right in holding that in view of Section 66 of the NDPS Act, the said document can be admitted in evidence and it goes to show that the said flat was owned by the appellant. Again the

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> High Court observed that 'even assuming' that the said agreement is excluded from consideration, there remains the specific information received, Exhbt.33 and his own statement recorded by the Authority under Section 313, Exhbt.83 and 84 and all of them go to show that the appellant was the owner of the said flat. As pointed out earlier that nobody has identified that flat in question as belonging to the appellant and in the absence of corroborating evidence, one cannot come to a confirmed conclusion regarding ownership and possession on the basis of the retracted statements of the appellant alone.'

But the facts of the case on hand is entirely different from the facts of the above said ratio. In this case the contraband of 1.500 kgs heroin was seized in the presence of A1, in the house where he was actually residing with his family members at Door No.57, Labby Street, Pudupet, Chennai, under his confession statement Ex.P.12.

16(xi) Per contra, the learned Special Public Prosecutor relying on 2003 AIR SCW 4536 (Megh Singh Vs. State of Punjab), and contended that under Section 20(b) of the NDPS Act possession of contraband articles is an offence. In order to make the possession illicit, there must be a conscious possession. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. The exact observation in the above ratio of the Honourable Apex Court is as follows:-

> "The word 'possession' means the legal right to possession (Health V. Drown (1972(2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (Sullivan Vs. Earl of Caithness (1976 (I) ALL ER 844 (QBD).
>
> Once possession is established the person who claims that it was not a conscious possession has to establish

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it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in Imadan Lal and another Vs. Sate of Himachal Pradesh (2003 (6) SCALE 482).

So from the ratio decidendi cited above, it is clear that the burden of proof is heavily on the accused who claims that he is not in conscious possession of the contraband. Absolutely there is no evidence on the side of the accused in this case to show that A1 was not in conscious possession of 1.500 kgs. of heroin, which was seized by P.W.1 and P.W.9 under Ex.P.8-mahazar, on the basis of Ex.P.11, voluntary confession statement of A1. So, the ground of acquittal by the trial Court on the ground that A1 was not in conscious possession of the contraband cannot be sustainable.

16(xii) The learned Amicus Curiea appearing for the respondents/accused would attack Ex.P.4, forwarding memo, dated 1.10.1995 prepared by P.W.1, on the ground that according to P.W.1 after seizure of the contraband weighing 1.500 kgs from A1 under Ex.P.3-mahazar, she went to NCB office and deposited the contraband seized in the NCB office godown and then prepared the forwarding memo-Ex.P.4, but it contains all the six accused names, which cannot be possible at that time for P.W.1 to note the names of all the accused. This point was controverted by the learned Special Public Prosecutor appearing for the appellant/State by focusing the attention of this Court to Ex.P.1-intelligence report, which was signed by P.W.1-himself along with P.W.5 and submitted to the Assistant Director of NCB, P.W.9. But a careful reading of Ex.P.1 will clearly go to show that the intelligence report contains only the names of A1 to A4 alone, but not the names of the carriers A5 & A6. So, the name of A5 and A6 found in Ex.P.4 cause a cloud on the case of the prosecution to the effect how P.W.1 was able to mention the name of A5 and A6 already in Ex.P.4. Further no contraband was recovered from A5 and A6, who were said to be staying in Room.No.207 at Hotal Rolax. There is also no evidence to show that A5 to A6 have carried the contraband seized from the other accused viz. A1 to A4. Under such circumstances, the appeal against the acquittal as against A5 and A6 cannot be interfered with at all.

16(xiii) The learned Amicus Curiea appearing for the respondents/accused would also attack Ex.P.7 on the ground that in the summon served on A1 on 1.10.1995 under Section 67 of the NDPS Act, NCB's file No.48/1/5/95/NCB/MDS has been mentioned which will throw suspicion on the prosecution case because the file number will be given only after the case has been registered against the accused. To answer this quarry raised by the learned Amicus

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Curiea, the learned Special Public prosecutor would clarify the position that NCB Chennai is a small unit with eight officers and they do not have case like regular police and therefore putting the filing number in Ex.P.7 cannot be a ground to doubt the prosecution case. Further it is pertinent to note in this case that with regard to this there is no question put in the cross-examination neither to P.W.9 nor P.W.1. In the cross-examination dated 30.5.1996 P.W.1 has clearly stated that godown register and crime register are maintained in the office and the crime number register was made after the contraband was seized. Even though there is question challenging the validity of Ex.P.4 was put to P.W.1 in the cross-examination, there is no question challenging Ex.P.7 was put to P.W.1. P.W.2 who speaks about Ex.P.7 has deposed in his chief examination that as per the direction of the Assistant Director, he gave Ex.P.7 to A1. There is no question pertaining to Ex.P.7 was put to P.W.2 challenging the validity of the same. Under such circumstances, it cannot be said that the mere mentioning of the file number in Ex.P.7 has vitiated the entire prosecution case.

16(xiv) The attack on the voluntary confession statement of the accused A1 to A6 under Section 67 of the NDPS Act, made by the learned Amicus Curiea is, that was not recorded then and there. But the explanation given by the prosecution is that the prosecution was conducting series of search in three different places one and the same day and after completing all the search and seizures, the suspects were questioned and their statements recorded under Ex.P.11 to 13 and 24 to 26.

16(xv) Principles to be followed while deciding an appeal against acquittal has been laid down in AIR 1988 SC 1998 (State of UP Vs. Anil Singh) as follows:-

> "But this Court will not hesitate to interfere if the acquittal is perverse in the sense that no reasonable person would have come to that conclusion, or if the acquittal is manifestly illegal or grossly unjust. .... It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

When coming to the case on hand a reading of the judgment of the trail Court will clearly go to show that the reasoning given by the learned trial Judge for acquittal of all the accused inspite of overwhelming evidence both oral and documentary are available to bring home the guilt of A1 to A4, the judgment of the trial Court is certainly to be assessed as perverse. From my above discussion, I do not hesitate to come to a conclusion that the judgment of the trial Court is palpably wrong, manifestly

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erroneous and demonstrably unsustainable as against A1 to A4 which necessitated this Court sitting in appeal to interfere with the findings of the learned trial Judge as against A1 to A4. This Court is of the firm view that the guilt against the accused 1 to 4 under Section 8(c) r/w 21 and 29 of the NDPS Act has been proved beyond any reasonable doubt. Point is answered accordingly.

17. In fine, the appeal is partly allowed and the judgement in C.C.No.631/1995 on the file of the Subordinate Judge for NDPS Act case, Chennai, is hereby set aside as against A1 to A4. A1 to A4 are convicted under Section 8 r/w 21 & 29 of the NDPS Act and sentenced each to undergo 10 years RI and to pay a fine of Rs.1,00,000/-(Rupees one lakh) each indefault to undergo one year SI each. The appeal is dismissed as against A5 and A6. The Trial Judge is directed to secure A1 to A4 and send to prison to undergo the sentence. This court place on record its appreciation for the services rendered by the learned Amicus Curiae and direct that a sum of Rs.10,000/- is to be paid to him by the State Legal Services Authority.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,

1. The Special Court for the NDPS Act,
Chennai.

2. The Member Secretary,
Tamilnadu State Legal services Authority,
Chennai.

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1 cc to mr.R. Rajaratnam, Advocate, sr. 2820

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